CAMPBELL

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ON THE

LAW OF CHURCH RATES.

BY

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M. P. FOR THE CITY OF EDINBURGH.

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LETTER,

&c.

My Lord,

As your Lordship was pleased at the close of the late debate in the House of Commons, respecting Church Rates, very peremptorily to deny the law which I had laid down, in supporting the motion of the Chancellor of the Exchequer, I feel called upon to justify my opinion by a calm reference to the authorities upon the subject. Let these be accurately and candidly examined, and I think your Lordship will be convinced that the language you employed was hasty, and that you were prompted by partizans who had viewed the question superficially, or with a prejudiced eye. This mode of discussing it, I conceive, will be more satisfactory than a legal controversy in the House of Commons, which would not admit of a full citation of acts of parliament, or decisions, and could consist of little more than assertion and denial. The inquiry must necessarily be dull and tedious; but I trust that no one who has ventured to dispute the opinion I gave, will refuse to enter into it fully and fairly.

After what has happened I must anxiously take

care that it be distinctly known what that opinion was. Be it remembered that I have never cast a doubt upon the legality of Church rates, or disputed that if a Church rate be regularly made by a majority of the parishioners, the payment of it may be lawfully enforced.

Church rates are certainly not of the remote antiquity which has been supposed by some, and there can be no doubt that in this country, all the expenses attending divine worship, were originally defrayed by the Church itself from a portion of the tithes. The *circesceat* or *Church shot* which King Canute ordered to be paid by the faithful, suggested to have meant Church Rates, consisted of the first-fruits of seed, rendered to the clergy yearly, on the Feast of St. Martin; and had no more connection with the repairs of the Church, than alms for the plough, or tithe of animals born during the year, or Peter's pence, the payment of which he likewise enjoins.

Mr. Justice Blackstone says, "At the first establishment of parochial clergy, the tithes of the parish were distributed in a four-fold division; one for the use of the Bishop, another for maintaining the fabric of the Church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the Bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was in-

ferred by the monasteries, that a small part was sufficient for the officiating priest, and that the remainder might well be applied for the use of their own fraternities, (the endowment of which was considered to be a work of the most exalted piety,) *subject to the burthen of repairing the Church*, and providing for its constant supply."*

So Lyndwood, Bishop of St. David's, the highest authority on Ecclesiastical law, who wrote in the 15th century, observes that, "By the *Common law*, the fabric or repair of the Church belongs to this day to the Rector, according to the appointment and cure of the Bishop; since under him that fourth due to the fabric of the Church, has been transferrred to the rector himself; so that he who has the fourth ought to repair the Church. So that, *at common law*, the laity may not be compelled to do this. But certainly by *custom* even the lay parishioners are compelled to this sort of repair, so that the lay people is compelled to observe this laudable custom." Const. Legatin. 113.

I might cite the epistle of Pope Gregory to Augustine the Monk, requiring a portion of the tithes to be set apart for the repair of churches,—an act of the Witenagemot in 1014, prescribing that a third part of the tithe shall be appropriated for this purpose,—and various decrees of Councils in the 12th and 13th centuries to the same effect. But all the books of authority, lay and ecclesiastical, agree

* Black. Com. 1. 384.

in the position that the burthen was at first laid and long continued upon the tithes.

Probably it was very gradually shifted to the parishioners, and their contributions to the expense were purely voluntary.

The custom growing, it was treated as an obligation, and enforced by ecclesiastical censures.

The Courts of Common Law seem to have interposed for the protection of refractory parishioners, till the statute of Circumspecte agatis, 13 Ed. I., which is in the form of a letter from the King to his Common Law Judges, desiring them to use themselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them, if they hold plea in court christian of such things as are merely spiritual, as "si prælatus puniat pro cimeterio non clauso, ecclesiâ discoopertâ, vel non decenter ornatâ."

Lord Coke observes, "That some have said, that this was no statute, but made by the Prelates themselves, yet that it is an act of parliament, &c."*

In the printed rolls of parliament, 25 Ed. 3. No. 62, it is called an Ordinance; but in the statute, 2 and 3 Ed. 6. c. 13. s. 15. it is expressly stiled a statute, and it must now clearly be taken to be the act of the whole legislature.

From the year 1282 therefore, the Bishops were authorized by ecclesiastical censures, to compel the

* Inst. 2. 487.

parishioners to repair, and to provide ornaments for the Church.

However, traces of the continuance of the original obligation in particular places are to be found much later, and in a MS. treatise, entitled, "The Tree of the Commonwealth," written by Edward Dudley, Privy Councillor to Henry VII., to be found in the Harleian Collection, No. 2204, after enumerating the duties of the clergy, the author calls upon them to perform these duties in all points, "employing the profits and revenues of their bene-"fices, as they by their own law are bound to do. "It is, one part thereof for their own living in good "household hospitality. The second in deeds of "charity and alms to the poor folk, and specially "within their diocese and cures, where they have "their living, and the third part thereof for the "repairing and building of their churches and "mansions."

The matter was still purely of ecclesiastical cognizance. It was regulated from time to time by canons and constitutions of Archbishops and Bishops, who ordained what the parishioners were to find at their own charge.

For example, by a Constitution of Archdeacon Winchelsea:—

"The parishioners shall find at their own charge, these several things following: a legend, an antiphonar, a grail, a psalter, a troper, an ordinal, a missal, a manual, the principal vestment, with a

chesible, a dalmatic, a tunic, with a coral cope, and all its appendages, a frontal for the great altar, with three towels, three surplices, one rochet, a cross for processions, cross for the dead, a censor, a lanthorn, an hand-bell to be carried before the body of Christ in the visitation of the sick, a pix for the body of Christ, a decent veil for lent, banners for the rogations, a vessel for the blessed waters, an osculatory, a candlestick for the taper at Easter, a font with a lock and key, the images in the Church, the chief image in the chancel, the reparation of the body of the church within and without, as well in the images as in the glass windows, the reparation of books and vestments whenever they shall need."*

In Popish times there was probably little difficulty in raising the rate without any assistance from the secular courts. When the common law, by which the expense was to be paid out of the tithes, had been forgotten, there could be hardly any reluctance to contribute to a burthen from which all, being of the same religion, derived an equal benefit; and if any parish refused to make a Church Rate by a majority of the vestry, there was a certain remedy by placing the parish under an interdict, by which the Parish Church was shut up, the administration of the sacraments within the parish was forbidden, and if any parishioner died, he was to be buried without bell, book, or candle.

It is laid down by Lyndwood that this was the

* Lindw. 251.; 1 Burn. Ecc. Law, 375

mode of proceeding, "that so the parishioners may be punished by the suspension or interdict of the place."

The question will be, whether since the glorious Reformation, an interdict having happily become impossible, a new remedy can be supplied and the law can be altered without the sanction of Parliament.

Before leaving this part of the subject, I must observe that in England the Church Rate never was a charge upon the land; and in this respect as well as others is clearly distinguishable from tithes, which can in no respect be considered a tax, or a render, or a payment by the occupier of the land of any thing that ever was his. In Jeffrey's case (5 Lord Co. Rep. 66.) deciding that the occupier of lands in one parish, though he reside in another, is rateable to the repair of the Church of the parish in which the lands lie, it was resolved that "the churchwardens and *greater part of the parishioners* met together, might make such a tax by their law, and that it don't charge the land but the person in respect of the land for equality and indifferency;" and it was said that "the reason why every parishioner is charged to the reparations of the Church, and to provide convenient ornaments in it for the greater convenience and honour of divine service, is first for the spiritual comfort which he has in hearing the word of God there for his instruction and the true way to heaven, in celebration

of the sacraments and in presenting to God their prayers, not only privately but with the great congregation, to be thankful to God for all his benefits, and to desire of him all things necessary, in respect of which inestimable benefits, he is chargeable to repair his own proper church in which he receives them."

In Burn's Ecclesiastical Law, vol. i. p. 384, we have—

"An order and a direction set down by Dr. King, Dr. Lewin, Dr. Lynsey, Dr. Hoane, Dr. Seveite, Dr. Steward, and other doctors of the civil law, to the number of thirteen in all, assembled together in the common dining hall of Doctors Commons in London, touching a course to be observed by the assessors in their taxations of the church and walls of the church-yard of Wrotham in Kent, and to be applied generally, upon occasions of like reparations, to all places in England whatsoever." By this —"Every inhabitant dwelling within the parish is to be charged *according to his ability*, whether in land or living within the same parish, or for his goods there; that is to say, for the best of them, but not for both.

From the difficulty in getting at the amount of personal property, the general practice has long been to confine the Church Rate as well as the Poors Rate to real property; but there seems no doubt that originally, personal as well as real property was subject to both, and that both were meant

to impose a tax upon the parishioners according to their substance and ability. So late as the year 1823, in the Poole Case it was decided by the High Court of Delegates, that by custom a Church Rate may lawfully be assessed upon shipping and stock in trade.*

This short sketch of the history and nature of Church Rates will assist us in solving the main question, whether there be now any compulsory means of raising money to repair the Church, if the parishioners refuse to make a rate for that purpose. If indeed the rate had been a charge upon the land, to which it has been subject from the earliest times, as affirmed by some to whom great reverence is due, there would be a strong probability that the Common law would afford a process for enforcing the obligation;—but if the contribution was voluntary in its origin, and has always remained personal, and for many centuries no remedy was known except spiritual censures, an inference may be drawn that spiritual censures can alone be resorted to, unless where a statute can be produced giving a remedy by civil process.

Now, what I maintained and do maintain is, that a legal Church Rate can only be made by a majority of the parishioners in vestry assembled; and that if they meet and refuse to make a rate, there are no means by which the rate can be raised.

* Miller v. Bloomfield and Slade, 1 Ad. Eccl. Rep. 499. 2 Ad. Eccl. Rep. 30.

This is a very unsatisfactory state of the law, and is one among many reasons why, for the peace of the Church and the benefit of religion, the law upon the subject should be altered, and that the expense of repairing the fabric of the Church, and providing for the decent celebration of divine worship, should be defrayed from another source.

It seems to be admitted on all hands, that in the first instance it is necessary to assemble the parishioners in vestry, and to propose to them to make a Church Rate,—when it must be put to the vote whether a Church Rate to a given amount shall be made or not. Let us suppose that they refuse to make any Church Rate. As the law now stands, what is to be done? I say nothing can be done. Your Lordship says, it shall not depend upon the caprice of a majority of the vestry to grant or to refuse.

I will examine in detail the different compulsory expedients which have been suggested.

That which I think has been most strongly relied upon is a mandamus by the Court of King's Bench to the churchwardens and parishioners to make a rate. And if there were a legal obligation upon them, I conceive that upon their refusal a mandamus would be granted as a matter of course. If there be a refusal to make a poor rate, or a highway rate, a mandamus immediately issues,—which would be followed by an attachment, or process of imprisonment against those who should disobey it.

The experiment of a mandamus to compel the making of a Church Rate has been tried more than once, and has as often failed.

In the year 1793, when Lord Kenyon was Chief Justice of the Court of King's Bench, an application was made for a mandamus to the Churchwardens of St. Peters, Thetford, to make a rate for the repairs of the Parish Church. The counsel admitted, that in general the rate should be made by the Churchwardens and inhabitants at a vestry, but said, that the former alone might make a Church Rate if the latter refused, and that the inhabitants had refused in this case.

The Court thought it so clear that they could not interfere by mandamus, that a rule to shew cause was refused.*

In Rex *v.* Wilson and others, decided in February 1825, when Lord Tenterden was Chief Justice of the King's Bench, a rule was obtained, calling on the Churchwardens of a parish in the county of Cambridge, to shew cause why a mandamus should not issue to them, commanding them to make a rate for the repairs of a donative Church in that parish.

Sir James Scarlett, now Lord Abinger, shewed cause and objected preliminarily, that a mandamus would not lie to the Churchwardens to make a rate. All that they could be required to do, was to call a meeting of the parishioners for the purpose of con-

* 5 Term, Rep. 364.

sidering the propriety of making a rate. The Churchwardens had no power to make a rate without the sanction of the vestry.

Mr. Denman, now Lord Denman, Chief Justice of the King's Bench, contra, admitted the force of the objection:

"Per Curiam. You cannot call upon the Churchwardens to make a rate. You can only call upon them to hold a vestry meeting for that purpose." Rule discharged.†

There may be a mandamus to raise a rate to pay a debt, incurred under the Church Building Acts, marking the distinction that the one is obligatory, and the other is not. Rex *v.* Churchwardens of St. Mary, Lambeth.*

This was an application for a mandamus to make a Church Rate to repay a debt contracted under the Church Building Acts, 58 Geo. 3, c. 45, and 59 Geo. 3, c. 154, which enact, that it shall be lawful for the Churchwardens, upon the application of the parishioners, to borrow money on the credit of the rates for the building of new churches, and in every such case to make rates for the payment of the interest of any monies advanced for the building any such Church, and for providing a fund for repayment of the principal. It was submitted on the part of the Churchwardens, that they could not, of their own authority, make a rate, and that the consent of the parishioners was necessary.

* Dowling and Ryland's Reports, vol. 5, p. 602.

† 3 Barn. & Ad. 651.

Lord Tenterden distinguished this case from the making of a common Church Rate, and held that by the statutes the Churchwardens were authorised to make the rate of their own authority.

The same distinction was taken, and the same rule laid down in Rex *v.* Churchwardens of Brighton in Michaelmas term, 1836.

In Rex *v.* Wix,* a mandamus was granted to elect Churchwardens, that they might exercise the powers which lawfully belong to Churchwardens, but no hint is thrown out that they could make a Church Rate without the vestry.

In Rex *v.* Churchwardens and Overseers of the poor of St. Margaret and St. John, Westminster,† the Court granted a mandamus to assemble a meeting to consider of a Church Rate, but expressly said they would not interfere by mandamus to compel the making of a Church Rate; and they would only command them "to assemble, in order to inquire whether it be fit that a rate should be made."

The last case is particularly strong to shew that as far as the Common law is concerned, the making of a rate is an act in the discretion of the vestry, as the parishioners were ordered to meet and to consider of it;—just as a mandamus will be granted to Quarter Sessions to hear an appeal: but wherever the decision is in the discretion of the parties to whom the mandamus is directed,—when they have deliberated, the power of the superior Court is at an

* 2 Barn. & Ad. 197. † 4 Maule & Sel. 230.

end, and the refusal to interfere farther proves the act to be discretionary.

I hope that after these authorities your Lordship will no longer insist upon the remedy, by mandamus, from whatever quarter it may be recommended.

Can any thing more be done in the Courts of Common Law? Will an indictment lie against the inhabitants of a parish for not repairing a church, as against the inhabitants of a parish for not repairing a highway, or against the inhabitants of a county for not repairing a public bridge? If the repair of the church were a Common law liability, like the repair of a highway or a bridge, I have no difficulty in saying that it might be enforced by indictment: but there is no precedent for such a proceeding, and I believe no lawyer will say that it could be adopted.

As there is no remedy at law, can equity give relief? None. No ingenuity could make this out to be a case of trust, or could find the proper parties to the bill.

The only recourse then is to the Ecclesiastical Courts. A valid rate they can enforce; but without a valid rate they are now powerless. The churchwardens may be cited; and if they had funds in hand they might unquestionably be compelled to repair the church. It seems to me equally clear, that on shewing that they have no funds in hand, and that a rate has been refused by the vestry, they must immediately be absolved. I shall prove, by

and bye, that they are not bound to lay out money, or to incur personal responsibility without a rate having been previously laid on to reimburse them, and that to repay a debt already incurred, a rate cannot lawfully be laid on, even by a majority of the vestry. Therefore, if the Ecclesiastical Court were to take any proceedings against churchwardens who have no funds, and who, having done their best, can obtain none, a prohibition to stay the proceedings would be immediately granted. *A fortiori,* nothing can be done against an individual parishioner, who is not an officer, by monition or otherwise. It has not been suggested that the majority who refused the rate may be excommunicated for that act. The interdict is gone, and it is replaced by no substitute.

There being no remedy in any Court, civil or criminal, lay or ecclesiastical, without a valid rate, the only question remaining is, whether a valid rate can be made without the consent of a majority of the vestry.

In the difficulty that has been occasionally experienced upon the subject ever since the Reformation, on a refusal by the parish, attempts have been hazarded to make a rate by the Ecclesiastical Court, or by Commissioners appointed for that purpose by the Bishops. These have been held to be illegal, and I apprehend will never be repeated. In the case of St. Mary Magdalen, Bermondsey,* it

* 2 Mod. 222.

was the opinion of the whole Court (among other things), that the Bishop or his Chancellor cannot set a rate upon a parish, but it must be done by the parishioners themselves; and so North, C. J., said that it had been lately ruled in the Common Pleas.

In Black *v.* Newcomb,* it was decided that the Ecclesiastical Court cannot make a rate, or appoint Commissioners to do it.

So in Rogers *v.* Davenant,† 26, and 27, Car. 2. "In prohibition the question was, whether if a church be out of repair, or so much out of order that it must be re-edified, the Bishop of the diocese may direct a commission to empower Commissioners to tax and rate every parishioner for the re-edifying thereof.

"The Court unanimously agreed that such commissions are against law, and therefore granted a prohibition to the Spiritual Court to stop a suit there commenced against some of the parishioners of Whitechapel for not paying the tax according to their proportions."

The last expedient is to contend, that if the parishioners refuse a rate, the churchwardens may, of their own authority, make a valid rate in spite of them.

I must first observe that this would be a very strange law, as it entirely annihilates the power and control which the parishioners have immemorially exercised over the rate. If the churchwardens have

* 12 Mod. 327. † 2 Mod. 8.

the power, they must be allowed to judge of the quantum of the rate, as well as the necessity for it, and the assembling of a vestry to consider of a rate would, in every instance, be a mere mockery. The privilege of the parish in this respect would be such as would belong to the House of Commons, if, upon their refusal to grant a supply, or such a supply as the minister requires, a tax to raise the amount might be imposed by the king's proclamation.

I may further observe, that if there were such a law, it would be well known,—it would be laid down in all the books upon the subject—and having the merit of being very simple and efficacious, it would be constantly acted upon where a rate is refused by the vestry.

But it is not to be found in any book that treats professedly of Church Rates, or the practice of the Ecclesiastical Courts.

In *Degges Parsons Councillor*, *part* 1. *c.* 12., the author, with some hesitation, says, he conceives that if the parishioners refuse or neglect to join in making an assessment, the Churchwardens having just cause for such assessment may proceed alone, they being liable to ecclesiastical censures for not repairing the church. He immediately adds, however, "But some are of opinion that the Churchwardens cannot proceed alone, but must compel the parishioners to do it by ecclesiastical censures : *Ideo quære.*"

His only reason, the supposed liability of the Churchwardens to punishment, for not repairing

without funds, is now proved to be fallacious, and if he had been aware of this he would probably have agreed with those who, he observes, deny the power of the Churchwardens to proceed alone, and he would not have considered the matter doubtful.

In Viner's Abridgment, and in Bacon's Abridgment, title "Churchwardens," it is said that if the parishioners upon notice refuse to come, or being assembled, refuse to make any rate, the Churchwardens may make one without their concurrence, on the ground that being liable to be punished in the Ecclesiastical Court for not repairing the church, it would be unreasonable that they should suffer by the wilfulness and obstinacy of others.

These two compilations, I conceive, are of no authority, unless when they are supported by the decisions which they cite. The following is the only case referred to in support of this doctrine :—

"T. T. 35. Car. 2—In Banco Regis,* Anonymous. —A motion for a prohibition to a suit in the Ecclesiastical Court, for a Churchwarden's rate, suggesting that they had pleaded that it was not made with the consent of the parishioners, and that the plea was refused.

"The Court said that the Churchwardens (if the parish were summoned and refused to meet and make a rate) might make one alone for the repairs

* Ventris, 367.

of the church, if needful ; because that, if the repairs were neglected, the Churchwardens were to be cited, and not the parishioners ; and a day was given to shew cause why there should not be a prohibition."

Now, in this very loose report of this anonymous case, by an inaccurate reporter, there is only an *obiter dictum* as to the power of the Churchwardens, which is contradicted by a rule to shew cause being granted why there should not be a prohibition, or in other words, why the rate should not be quashed as invalid ; and the reporter never states what was the judgment of the Court when cause was shewn.

I have, I believe, stated all that is in print, or that was at all known in Westminster Hall on this point, till, during the reply of the Chancellor of the Exchequer, a decision of Sir Wm. Wynne in the year 1799, was cited from a MS. note of Dr. Arnold, by Dr. Nicholl, M.P. for Cardiff. The case is Gandern *v.* Selby, and was very accurately cited : but when examined will be found entitled to no weight whatever ; and I apprehend it must have remained unpublished, like many other notes of erroneous decisions, because the publication of it would only introduce uncertainty and confusion into the law.

Selby, a Churchwarden of Easton Mawdit, sued Gandern in the Ecclesiastical Court of Peterborough, for non-payment of Church Rate, and he alleged in his libel that the Church being out

of repair, and other things wanting, &c.; the parishioners met and agreed on a Church Rate of $9\frac{1}{2}d.$ in the pound. The defendant pleaded among other things that the rate had not been obtained by the major part of the parishioners. It appeared by the evidence, that the Parish Church requiring some repairs, Selby, having no funds in hand, instead of calling a vestry, and making an estimate of the repairs, ordered such repairs as he thought necessary to be done on his own credit. He then called a vestry to make a rate to reimburse him, and asked a rate of $9\frac{1}{2}d.$ in the pound. The parishioners objected, that the repairs were not necessary, and that they had employed a mason to overlook them, who confirmed this statement. They offered a rate of $6d.$ in the pound, and refused more. Selby, then, by his own authority, made a rate of $9\frac{1}{2}d.$ in the pound for his own reimbursement.

Sir W. Wynne, on appeal to the Court of Arches, is supposed to have held this rate to be valid, and to have condemned the appellant in costs.

Sir W. Wynne cites no authority whatever, and gives no reason, except that Churchwardens may be proceeded against for not repairing, although they cannot get a rate, which is clearly a mistake, and that, as an interdict and other ecclesiastical censures are now unavailing, there is no other remedy.

Without any disrespect to the memory of Sir W. Wynne, I must be permitted to say, that if he so decided, he decided erroneously.

It seems strange, in the first place, that the plaintiff should have succeeded, when the material allegation of the libel had been denied and negatived by the evidence—that the $9\frac{1}{2}d.$ rate was made by a majority of the parishioners. Even if a rate made by churchwardens against the will of the parish be good, the truth ought to be stated in a proceeding to enforce it: but it might have been inconvenient to have stated the truth in the libel, as the want of jurisdiction would have appeared, and the proceeding would have been held null in a Court of Law after sentence. Next, we have the anomaly of one Churchwarden acting without any account of the other; and such an act by one of two Churchwardens must be void. Then we have it laid down, that a Churchwarden can make a rate for his own reimbursement, and that he is the sole judge of the sum required.

I will venture to say, that if Gandern had applied to the Court of King's Bench, or that, if the case had been brought by appeal before the Court of Delegates, the rate would have been held to be invalid. The objection that it was retrospective would alone have been fatal. It is now considered clear law, that a retrospective Church Rate is bad; and this goes to the very foundation of the supposed power of the Churchwardens to make a rate against the will of the parish.

In Rex *v.* Haworth* it was decided, upon the

* 12 East, 556.

authority of several prior cases, that a rate to reimburse Churchwardens such sums as they *had expended*, or might thereafter expend, on the Parish Church is bad on the face of it, as in part retrospective.

Lord Ellenborough there says:—"The regular way is for the Churchwardens to raise the money before hand by a rate made in the regular form for the repairs of the Church, in order that the money may be paid by the existing inhabitants at the time, on whom the burthen ought properly to fall. It will, indeed, sometimes happen that more may be required to be expended at the time than the actual sum collected will cover; but still it is admitted that the inconvenience has been gotten rid of in such cases by an evasion: for the rate has been made in the common form, and when the Churchwardens have collected the money, they have repaid themselves what they have disbursed for the parish. But we cannot now grant the mandamus to make a rate in the common form; for the demand made upon the defendants was to make a rate in the form in which the rule is drawn up, to reimburse the Churchwardens of Bradford for money which they had expended, as well as for what they might expend; and the refusal of the defendants to make such a rate applies to the form of the demand; and we cannot now qualify their refusal. At present it appears that the rate prayed for in this form would

be bad, and therefore we cannot enforce it by mandamus." Per Curiam. Rule discharged.

The illegality of a retrospective Church Rate has likewise been decided in equity. In Lanchester *v.* Thompson,* an attempt was tried to force the making of a Church Rate on the ground that the vestry had sanctioned the expense which the Churchwarden had incurred. But Sir John Leach, M.R. said, " In the case before Lord Ellenborough it was established, that a Church Rate can be legally made for the reimbursement of no Churchwarden, because that would shift the burden from the parishioners at the time, to future parishioners. The law was the same with respect to the Poor Rate, until a late statute. And although the Spiritual Court may compel a Church Rate for the purpose of repair, it must follow the law, and cannot compel a rate for reimbursement."

A question has been made, whether if the rate does not profess upon the face of it to be for a retrospective purpose, it can be invalidated on the ground, that in truth it was made either in whole or in part to defray a debt contracted by Churchwardens ; but in a late case in the Consistory Court of the Bishop of London, it was decided by the very learned Judge of that Court, that the evasion of making a rate professing to be prospective, but meant to be retrospective, cannot be tolerated, and that whatever the form of the rate may

* 5 Madd. 4.

be, if the rate be really made to pay off a debt already contracted it is void.

The case was Chesterton and Hutchins,* respecting the legality of a Church Rate for the parish of Kensington, which appeared on the face of it in the usual form, but was made partly to cover a debt previously incurred by the Churchwardens.

Dr. Lushington. "It is admitted that the Rate is a retrospective Rate, to the extent of more than one-third of the whole amount, though not on the face of it,—and the question I have to decide is, whether a Rate, admitted to be retrospective to the extent which I have stated, can or cannot be enforced by the authority of this Court. Now, it is my duty, on the present occasion, to be entirely guided by the decisions which have previously taken place in Courts which have had to consider this question; and if I see any reasonable doubt as to what the law is, I shall certainly deem it my duty to give the Churchwardens the benefit of that doubt, and by admitting the allegation, leave the other party to proceed as he may be advised. But if, on the other hand, the law is clear, and laid down by high authorities who have decided the point, I apprehend I am bound in duty to bow to those authorities, and to pronounce against the admission of this allegation. It is not disputed that a rate, which on the face of it is retrospective, is vicious,

* Decided April 28th, 1836, not yet reported.

and that it is impossible that such rate can be enforced. Whatever decisions there may have been on the subject from early times down to a comparatively modern period, it has been since settled by repeated decisions in the Court of King's Bench and the Court of Chancery, that a Church Rate cannot be retrospective. A case occurred in the year 1770, in which the decision of Sir George Hay was apparently founded on a different principle. In that case, Sir George Hay rejected an allegation of a defendant resisting a Church Rate, on the ground that it was retrospective for one year; and thus the law stood in these Courts till 1812, in which year my predecessor, Sir Christopher Robinson, in the Spitalfields case, held the same doctrine as Sir George Hay, in 1770. But the parties, in that case, had so little hope of succeeding in a Court of Law, that they declined proceeding. Since then, the decisions have been uniform, that a rate, which is on the face of it retrospective, cannot be enforced. But I am now to consider whether a rate, which is not on the face of it retrospective, but which is admitted to be intended to cover in part expenses previously incurred, is legal or not. Had these sums been of small amount I should have felt myself justified in leaving them entirely out of consideration; but in the present case, it cannot be said that the sums admitted to be retrospective are trivial or unimportant. Now the case is this: I cannot say

that any case has yet been decided, which expressly and directly governs the present case; but I cannot, on principle, comprehend that there is any real distinction between the case of a rate on the face of it retrospective, and a rate admitted to be intended to cover debts, or part of a debt, previously incurred. It appears to me to be a distinction without any foundation, and that the cases are without any real and essential difference. Can it be maintained that this Court is bound to set aside a Church Rate where the party making it had avowed an illegal object on the face of it, and to give force and effect to a rate where the object, though not equally avowed, was equally clear and illegal? I am unable to see any such distinction, and I am very clearly of opinion that if such distinction were attempted in a Court of Law, it would not be admitted. For the consequence would be absurd: it would be in the power of any Vestry, by shaping the heading of the rate, to suit their own purposes, to violate the law at their own pleasure, and to any extent. I think that all the principles laid down by the Court of King's Bench, and by the Vice Chancellor, in the case of Lanchester against Thompson, are equally applicable to rates admitted and intended to be retrospective, and to those which are retrospective on the face of them." Rate adjudged to be illegal.

Finally, Sir W. Wynne's doctrine is completely demolished by a decision of the Court of Exchequer,

in the time of that great Judge, Lord Lyndhurst. The case was *Northwaite* v. *Bennett*,* in which Mr. Baron Bayley intimated a strong opinion, that a Churchwarden is not bound to do repairs to a church on credit; that it is his duty to take care that he has funds in hand, and to pay ready money; and that it would be a good answer for a Churchwarden to a libel in the Spiritual Court for not repairing a church, that he was not bound to use his own money, and had taken steps to get a rate paid, but without success.

Lord Lyndhurst—"No fund appeared to exist at the time out of which the repairs might be paid for. I question if a Churchwarden is bound to incur responsibility by putting a church in repair, if the parish do not previously supply him with funds for that purpose."

I deem it unnecessary to take further notice of the decision of Sir W. Wynne, which I believe never was quoted in any Court, lay or ecclesiastical, and which has lain *in retentis* for a period of thirty-eight years. I may boldly ask, if this were law, would it not have been acted upon in some one of the many instances in which Church Rates have been refused of late years. The civilians, and the common lawyers, and equity lawyers, who have been consulted about the mode of dealing with an obstinate vestry, while they have suggested the possibility of succeeding by mandamus, or monition, or

* 4 Tyrwhitts Exch. Rep. 236.

bill in equity, appear never to have thought of the plain, straight-forward course of the Churchwardens making a rate by their own authority.

Let it not be supposed that this has been prevented by that which, were there such a power upon a refusal by the Vestry, would be a shallow device,—an adjournment for a twelvemonth. Such an adjournment, or any adjournment with the intention of refusing, is the refusal of a rate, and would clearly admit the Churchwardens to the exercise of any power which a refusal confers upon them.

But there is no ground for saying, that the authority of Churchwardens in making a rate goes farther than this—that if a vestry is regularly called to make a rate, and none except the Churchwardens attend, the Churchwardens then constituting the parish may make a rate;—as I conceive that they might do any other act competent to the vestry, of which they are members.

Lord Holt is said to have been of opinion, "that if there be public notice given to the parishioners, and they will not come, the Churchwardens may make a rate without them."*

I have no doubt that this opinion is sound, and that it is the only foundation for the notion, that the Churchwardens can make a rate without the parishioners.

A more extensive power in the Churchwardens

* Comb. 344.

was unknown to Lyndwood ; and Gibson, elaborately defining the power of the Churchwardens in making a rate, must be taken to deny it :—

" Rates for the reparation of the Church are to be made by the Churchwardens, together with the parishioners assembled upon public notice given in the Church. And the major part of them that appear shall bind the parish : or, if none appear, the churchwardens alone may make the rate, because they, and not the parishioners, are to be cited and punished in default of repairs. But the Bishop cannot direct a commission to rate the parishioners, and appoint what each one shall pay. This must be done by the churchwardens and parishioners, and the Spiritual Court may inflict spiritual censures till they do."

Upon a refusal, spiritual censures were considered the only remedy.

I will now cite some Common law authorities, in which the power to make the rate was held to be in the majority of the parishioners, without any restriction, qualification, or exception.

" Pierce v. Prowse, Salk. 165.—Churchwardens assessed a rate, for repairs of the Church, and after libelled against a parishioner for not paying it. *Et per cur.* being moved for a prohibition. The parishioners ought to assess the rate, and not the churchwardens."

" S. C. 1. Lord Raymond, 59.—Mr. Pratt moved for a prohibition to the Consistory Court of the Bishop of Exeter, where his client was libelled

against for a rate assessed by the churchwardens by custom, for the repair of the Church, as well the chancel as the nave of the Church; and resolved, 1. That the parishioners, and not the churchwardens, ought to assess the rate.—A prohibition was granted."

In Rogers v. Davenant, as reported 2. Mod. 194.—"Wyndham, Atkyns, and Ellis, Justices, accorded, the churchwardens cannot, none but a Parliament can, impose a tax, but the greater part of the parish can make a bye-law, and to this purpose they are a corporation."

In a case reported, 1 Mod. 79. it is stated to have been decided that, "the Spiritual Court cannot impose the payment of a rate made by churchwardens only.

"Moved for a prohibition to the Spiritual Court. For that they sue a parish, for not paying a rate made by the churchwardens only, whereas by the law the major part of the parish must join. TWISDEN, Justice.—Perhaps no more of the parish will come together. COUNSEL.—If that did appear it might be something."

The very form in which a Church Rate is made appears to me clearly to shew that it is, and must be, the act of the majority of the parishioners taxing the parish.

The following is from Burn's Ecclesiastical Law, and, I believe, is that which has been universally followed.

"We, the *churchwardens and other parishioners* of the parish of in the County and diocese of , whose names are hereunto subscribed, do hereby this day of in the year at our vestry meeting for that purpose assembled, *rate and tax* all and every the inhabitants and parishioners aforesaid here undermentioned, for and towards the repairs of the Church of the said parish for this present year, the several sums following,—

		£.	s.	d.
A. B.	- -	1	2	0
C. D.	- -	0	3	0
E. F.	- -	0	2	6

And so on.

A. B.
C. D. } *Churchwardens.*

E. F.
G. H.
I. K. } *Parishioners.*"
&c.

I will now only refer your Lordship to the opinion of an eminent divine of the Church of England, a thorough Conservative, a determined opponent of the Ministerial plan, the Hon. and Rev. A. P. Perceval, B.C.L., who has just published a very interesting pamphlet on the subject of Church Rates. Having stated that the agreement to make a rate is a spiritual duty, and to which men are no otherwise bound than by those motives of conscience

and religion to which alone the Spiritual Courts appeal; he says—

"It is this which makes the marked difference between rates and tithes, which some persons, for purposes best known to themselves, seem anxious to confound. Rates up to this hour are *a voluntary contribution* on the part of a parish, to which, if they refuse, there is no earthly power to compel them. But tithes are a distinct property; the only thing voluntary here, is, whether a man will cultivate his land or not; if he does, one-tenth of the produce is not his but another's, who may sell it to whom he pleases."

I hope your Lordship may think that I have now vindicated the legal opinion which I gave in the House of Commons upon the subject of making a Church Rate, and that although I did not then cite legal authorities, I did not speak without book. If the legal argument which I have the honour to address to you admits of an answer, let it be answered, and impartial inquirers will decide between us. But I must insist upon the practical remedy being pointed out for levying the rate, upon the refusal of a rate by the Vestry. Mere *dicta* as to the obligation upon the parish to repair will not invalidate my position.

I will not mix up this question with your charges against me as a politician farther than distinctly to deny them, and to express my readiness

to refute them whenever you shall give me the opportunity. I must add, that in the speech to which you replied with so much warmth, I had no intention, as I could have no motive, wantonly to attack you. Till I heard your assertion of *consistency*, I own I was not aware that you meant to contend that having introduced the Irish Church Temporalities Bill and opposing a Bill for England on the same principle, you were to contend that you were *consistent*. I expected that your Lordship would say that you had seen reason to change your opinion respecting such measures, and I am sure I should most willingly have given you credit for sincerity, for disinterestedness, for a high sense of honour, and a chivalrous devotion to what you considered the good of your country;—but when your present coadjutors taunted us with inconsistency in bringing forward this plan, there was surely nothing unfair in reminding the House that one of its most violent opponents was the author of a plan for abolishing Church Rates in Ireland, and providing a substitute, not only by allowing the lessees of Bishops' lands to acquire a permanent interest in them upon equitable terms, but by abolishing ten bishoprics, and imposing a tax on all ecclesiastical livings to boot. It may be easy to point out differences in the details of the two measures, which would be very fit subject of discussion in Committee; but does your Lordship believe that any unprejudiced persons will say that all the objections

to the principle of the English measure might not have been urged with greater force against the Irish. Hear what is said on this subject by the Hon. and Rev. Mr. Perceval:—

"But, says Mr. Rice, why call it monstrous at all, when it is no more than we did to your Church in Ireland four years ago? 'Tis very true; but there is a saying of a wise man not wholly irrelevant to the point:—'Bind not one sin upon another, for in one thou shalt not go unpunished.' It is very true that in 1833 this nation did to the Church of Christ in Ireland even worse than it now meditates to do to it in England. * * * * * The year 1833 witnessed the spectacle of an ancient and independent Christian Church, teaching the way of God in truth, loyal and faithful to the civil government, in the midst of assaults from its enemies, being singled out by that same government as an object for insult, tyranny and sacrilege, to vent themselves upon;—its apostolic government superseded by a new state commission; the whole of its endowments transferred to that commission; and ten of its bishoprics annihilated at one blow; while almost the whole church and nation of England stood by in silence, and scarcely raised a voice against such revolting impiety."—p. 46.

Mr. Perceval is consistent in denouncing the present plan; so is Sir Robert Inglis; so is Sir Robert Peel: but Lord Stanley can only claim the merit of good intentions; and methinks he might

shew a little more forbearance and a little more Christian charity for those who still retain the opinions which he has seen reason to abandon.

Before I conclude, permit me, my Lord, very respectfully, to ask your Lordship again to consider whether it may not be for the peace of the Church and the advantage of religion to accept the offer now made. Can the present system of Church Rates efficiently and beneficially continue? Mr. Perceval says, in the publication to which I have before referred, that the existing state of the law has occasioned clamour and confusion throughout the kingdom,—that it has disturbed the peace of numberless parishes,—turned the temples of God into election booths,—and substituted the fiercest ebullitions of base party spirit for the solemn and holy devotion which befits Christian men when engaged in a subject so nearly affecting the honour of Almighty God, as the repairing and decently providing for his house of prayer.

These crying evils, I am afraid, are likely to be aggravated, and there is a danger that in many parishes the Church Rate, upon its present footing, may prove wholly inadequate to its purpose—that there may be no available fund for the repair of Churches—and that by opposing this measure the lamentable consequence may follow (which is falsely charged to be the wish of its promoters), that those venerable edifices, under which the ashes of our forefathers repose, and which are so closely con-

nected with all the most solemn circumstances of our own earthly career, and with our eternal hopes, may become a heap of ruins.

Your Lordship calls for a more stringent law to enforce the payment of Church Rates. Read the stringent code for the payment of Irish tithes, and remember how it has operated.

There is proposed a certain and safe substitute for Church Rates, which, when the details of the measure are adjusted, may be applied without loss, and without injury to any one. Your Lordship asks, whether the new created fund belongs to the State or the Church? I might answer in the words of a distinguished Nobleman, "I say to the state:" but whether it belong to the State or the Church, *quacunque viâ datâ*, its destination is legitimate. If it belongs to the State, the State may apply it to a purpose beneficial to the community, and akin to the purpose for which the property was originally intended. If it belongs to the Church, it may be fairly applied to any ecclesiastical purpose: and surely it is an ecclesiastical purpose to repair the fabric of the house of God, and to provide for the decent celebration of religious worship, according to the rites and ceremonies of the established religion.

The most plausible objection to the plan certainly is, that the fund might be advantageously employed in augmenting small livings and extending religious instruction. I hope there may soon be a surplus

applicable to this laudable object; but is it not true wisdom, before proceeding to new endowments to secure the efficiency of those which we already possess?

The men who say that church lands are for ever to continue to be held and let on their present footing, are not to be reasoned with. I will venture to say that this is the worst species of tenure for all concerned that ever was invented. Copyhold with a fine, according to the improved value, is bad enough, and I have been encouraged by eminent men of all parties in the state in my efforts to improve it. But there the tenant is entitled *de jure* to a renewal from the lord on payment of his fine; whereas the church lessee has no right recognised at law or in equity after the expiration of his term, and the Bishop may, when he pleases, run his life against the lives in the lease, or exact what conditions he pleases for a renewal. The equitable enfranchisement of copyholds would be no injury to lords of manors; the enfranchisement of church lands would be no injury to the church—there being reserved to every dignitary and his successor the full amount of his present income upon security that can never fail.

The existing tenure produced comparatively little inconvenience in a rude state of agriculture, but is now becoming daily more injurious, when permanent improvements are taking place wherever there is a fair return for capital, and our rapidly growing

population can only be supported by the increased produce of the soil.

I conceive that the great principle of legislation is to make laws harmonize with the altered circumstances of the times. Church Rates themselves when first submitted to, were not unequal or unjust. Would the tax have been originally sanctioned, if, in the reign of Edward I., a large proportion of those who were to pay it had dissented from the established religion, and had been permitted to erect and to maintain places of religious worship of their own. In the present state of society is it right, that no man, whatever his religious creed may be, can occupy a cottage, or a warehouse, or a shop, without being liable to be assessed to the Church Rate? It has been supposed that this liability is only incurred by choice when a man purchases an estate; but, falling upon the occupier, no man in the realm, who cultivates a patch of land, or is in possession of any building for habitation or business, can avoid it.

Sir Robert Peel himself, although for different reasons, has pronounced the tax unequal and unjust. Is there any chance then of its continuing much longer?

If I have in any degree succeeded in shewing to your Lordship, that it partakes of the voluntary principle (which I agree with you cannot be relied upon for supplying adequate religious instruction to the population of this country), I may have induced

your Lordship to regard more favourably a certain, fixed, permanent, legal provision by the state for the repair of religious edifices and the decent celebration of divine worship—not depending on "the caprice of the vestry" or the relative proportions of Churchmen and Dissenters in any parish.

I can only express my firm conviction, that if the commutation of tithes were followed up by this healing measure, finding a substitute for Church Rates, the possibility of any collision between Churchmen and Dissenters being obviated, all enmity to the Church would die away, and religious peace and concord would prevail throughout the land.

> Sed quis erit modus? aut quo nunc certamina tanta?
> Quin potius pacem æternam—
> Exercemus.

I have the honour to be,

My Lord,

Your Lordship's obedient Servant,

J. CAMPBELL.

TEMPLE,
March 31*st*, 1837.

NORMAN AND SKEEN, PRINTERS, MAIDEN LANE, COVENT GARDEN.